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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. FRANKLIN CASCO, JR., Defendant and Appellant.	G049375 (Super. Ct. No. 10HF0799) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, William R. Froeberg and Dan McNerney, Judges. Request for judicial notice. Judgment affirmed. Request denied.

Philadelphia Law Center and James R. DiFrank, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, William M. Wood, Brendon W. Marshall and Aimee Feinberg, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

In a joint trial, the jury found Franklin Casco, Jr. (defendant), and Larry Lorenzo Cardenas guilty of one count each of conspiracy to commit harassment by an electronic communication device and stalking, plus four counts each of false personation and identity theft. The trial court denied defendant's posttrial motion for acquittal or new trial and sentenced him to two years in state prison.

Defendant challenges the sufficiency of the evidence to support his conviction on all of the charges. In addition, he contends the trial court erred by (1) denying his requests to sever his prosecution from Cardenas for the purpose of trial; (2) admitting a statement Cardenas made to a police officer; (3) excluding evidence intended to impeach the credibility of one victim; and (4) denying his posttrial motion. In support of the last ruling, defendant requests we take judicial notice of the criminal docket in a 2005 Los Angeles County Superior Court case where he represented Cardenas in an unrelated criminal prosecution.

Since the Los Angeles County Superior Court records do not support defendant's attorney-client privilege claim, we deny his request to take judicial notice of it. Finding his other claims lack merit, we affirm the judgment.

FACTS

In May 2009, Melanie and Douglas Delanoy lived at a residence on a corner lot in a gated community. Defendant lived next door to the Delanoys. At the time, Melanie Delanoy was involved in a civil lawsuit brought against her by defendant and several other residents over a home renovation project. She testified that at a late April deposition in the civil action, defendant became "quite explosive" and that he and his attorney "storm[ed] out" of the deposition before it had been completed. The attorney representing defendant and the other plaintiffs in that lawsuit disputed Delanoy's

description of defendant's behavior. He testified that he stopped the deposition because the questioning had become cumulative. The civil action subsequently settled with Melanie Delanoy and the other defendants agreeing to pay the plaintiffs $700,000.

The community where the Delanoys and defendant lived has two access gates. The security company responsible for operating the gates allowed only residents to authorize entry by guests. It had created a system to verify that a person placing a nonresident's name on the guest list lived in the community. However, because the resident verification system was new, the guards often failed to request or obtain the proper authentication before adding a name to the guest list.

On May 2, the Delanoys were out of town on a vacation. That morning Ray Lambert's name was placed on the guest list for the Delanoys' residence at Gate 1. Due to problems with the security company's computer system, Lambert's name did not appear as an authorized guest at Gate 2.

Sometime before 10:00 a.m., a resident approached Paul Ponthieux, the security guard at Gate 2, and asked if anyone had tried to enter the community to visit the Delanoy residence. Ponthieux said no and the person "kinda[] scoffed, he laughed and then walked away." Ponthieux said the inquirer was the "next door neighbor," describing him as "Asian," in his 40's, with a round head, a square jaw, approximately 6 foot, 2 inches in height, and had either slicked back or spiked black hair.

Later that morning, Lambert himself approached Gate 2, gave Ponthieux the Delanoys' address and Melanie Delanoy's cell phone number, and asked him to call her. Ponthieux contacted Delanoy and she asked to speak with Lambert. He told her that they had previously contacted each other through an Internet web site called MySpace and had made an appointment to meet. Delanoy told Lambert that she did not know him and directed Ponthieux not to let Lambert enter the community. Lambert left.

The Delanoys logged on to MySpace and discovered someone had created a profile for Melanie Delanoy on it. The profile contained photographs of her and Elsie

Delanoy, her mother-in-law, plus personal information, including the Delanoys' address and Douglas' name. In addition, it contained sexually explicit music and comments. The Delanoys denied they had created or authorized anyone to create the MySpace profile.

They reported the creation of the false profile and a false advertisement found on another web site to the police department. Over the next several months, numerous additional advertisements appeared on different web sites that were neither created nor authorized by the Delanoys. The postings contained language suggesting Melanie Delanoy and Elsie Delanoy were offering sexual services in return for money. One advertisement was described as a "hooker profile." Others contained sexually explicit photographs, references to numbers such as "100.00" and "250" along with the term "roses," plus the words "Greek," "super freaks," and "GFE." Some identified Douglas Delanoy as the women's "agent." A police officer testified the foregoing terms were frequently used in advertisements for prostitution.

A few of the postings also included the home address and telephone number of George and Elsie Delanoy, Douglas' parents and the travel business he operated with them. George Delanoy's photograph appeared in one advertisement entitled, "Halloween Swingers."

Douglas Delanoy testified he found e-mails falsely purporting to have been sent by him, inviting recipients to view the travel agency's web site. Upon clicking the attached link, the recipient would see one of the foregoing advertisements.

Melanie Delanoy testified that, other than the call concerning Lambert, she never received any telephone calls related to the web site advertisements. However, numerous telephone calls, voicemails, and e-mails responding to the advertisements were received at the travel agency and at the home of Douglas Delanoy's parents. The advertisements and e-mails stopped appearing in mid-November after the Delanoys obtained a restraining order against defendant.

The police department's investigation discovered two Internet Protocol (IP) addresses connected to the creation of the advertisements. A secondary IP address was traced to defendant's law office. On November 19, the police conducted a search of defendant's law office and seized a computer found underneath his desk. The police performed a forensic search of the computer's hard drive. The search revealed the hard drive contained part of the text appearing in some of the web site advertisements and that computer had been used to conduct numerous Internet searches of the Delanoys, their home address, the home address of Douglas' parents, and the travel agency.

The primary IP address was for a Time Warner subscription registered to a residence occupied by Veronica Lopez, the mother of Cardenas' child. Lopez testified Cardenas, who worked in defendant's law firm, lived with her until the latter part of 2009. He also had a user account at that IP address. Two days after the police searched defendant's law office, the Time Warner subscription was terminated.

In February 2010, the police searched Cardenas' residence, seizing a laptop and several thumb drives. With his consent, the police conducted a forensic search of these items. One thumb drive contained the photographs of the victims and the sexually explicit material that appeared in the various advertisements and e-mails.

The laptop seized from Cardenas' residence contained software installed in early December 2009. When Cardenas went to the police station to retrieve the laptop an officer commented that it appeared to be new. Over objection, the officer was allowed to testify Cardenas responded that he had recently acquired the laptop to replace an older one. The court instructed the jury that it could "consider this statement . . . only as to Mr. Cardenas, not as to Mr. Casco."

DISCUSSION

1. Sufficiency of the Evidence

Defendant challenges the sufficiency of the evidence supporting his conviction on each charge. First, he argues "the evidence presented at trial was insufficient to establish th[at] he had committed any of the criminal acts." His alternative contention is that "the false . . . [I]nternet ads were perceived by the [persons] solicited as requests for consensual sex" and "[t]here is no evidence . . . the[se persons] had any criminal intent to either harass, threaten, annoy, molest, or commit any acts of violence against the victims."

These contentions are meritless. The principles governing sufficiency of the evidence claims are "clear and well settled." (*People v. Abilez* (2007) 41 Cal.4th 472, 504.) "'The proper test . . . is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.'" (*People v. Perez* (2010) 50 Cal.4th 222, 229; *Jackson v. Virginia* (1979) 443 U.S. 307, 319 [99 S.Ct. 2781, 61 L.Ed.2d 560] ["[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt].)

Granted the prosecution's case against defendant was almost entirely based on circumstantial evidence. But "'"'"Circumstantial evidence may be sufficient to connect a defendant with the crime and to prove his guilt beyond a reasonable doubt."'"'" (*People v. Abilez, supra,* 41 Cal.4th at p. 504.)

On the first contention, the evidence supported a conclusion defendant either conspired with or aided and abetted Cardenas in committing the charged crimes.

The existence of a conspiracy can be shown by circumstantial evidence (*People v. Rodriguez* (1994) 8 Cal.4th 1060, 1134) and it "'"may be inferred from the conduct, relationship, interests, and activities of the alleged conspirators before and during the alleged conspiracy."'" (*People v. Maciel* (2013) 57 Cal.4th 482, 515-516.) As for his potential culpability as an aider and abettor, the fact that "there was no direct evidence that [defendant] instigated the [charged offenses] or encouraged or advised [their] commission" does not justify reversal because "substantial evidence encompasses circumstantial evidence and any reasonable inferences to be drawn from such evidence." (*People v. Lopez* (2013) 56 Cal.4th 1028, 1069-1070.)

Cardenas worked in defendant's law office. Evidence relevant to the creation of the false web site advertisements was found on both a computer discovered under defendant's office desk and a thumb drive possessed by Cardenas. The advertisements ceased after the Delanoys obtained a restraining order against defendant. Ponthieux testified that early on the day Lambert approached the gate, a resident who he claimed lived next door to the Delanoys, inquired whether anyone had sought admission to the community to visit the Delanoys. Defendant was their only next door neighbor. Cardenas lived in another city.

Concededly, Ponthieux gave inconsistent and conflicting testimony. While his physical description of the inquirer partly fit defendant, he claimed the individual was "Asian." Defendant is not of Asian descent. (The probation report states he was born in Costa Rica.) When shown a series of photographs that included one of defendant, Ponthieux chose the pictures of two other persons as looking similar to the person who made the early morning inquiry about the Delanoy residence. Even so, the conflicts and inconsistencies did not render Ponthieux's testimony insufficient to support an inference that defendant was the one who made the inquiry. "'Except in . . . rare instances of demonstrable falsity, doubts about the credibility of the in-court witness should be left for

the jury's resolution . . . .'" (*People v. Hovarter* (2008) 44 Cal.4th 983, 996.) Here, "The evidence casting doubt on [Ponthieux's] credibility was presented to the jury and argued at length by counsel. The evidence . . . did not reveal demonstrable falsity or physical impossibility. . . . The trial court acted properly in leaving the weight of the testimony to the jury." (*People v. Brown* (2014) 59 Cal.4th 86, 105.)

Defendant appears to argue the conflicting evidence on his identity as the resident who asked Ponthieux about possible Delanoy visitors, precludes upholding his conviction. That is not the law. "If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding." (*People v. Lindberg* (2008) 45 Cal.4th 1, 27.)

Defendant's participation in the acrimonious litigation against the Delanoys also gave him a motive to commit the crimes. (*People v. Lopez, supra,* 56 Cal.4th at p. 1070 ["The presence of motive is a circumstance that may establish guilt"].) There was no evidence at trial indicating Cardenas had any relationship with the victims that would have motivated him to create and post Melanie Delanoy's false MySpace profile and the web site advertisements suggesting the victims were engaged in soliciting prostitution. Throughout his argument defendant cites to what he describes as Cardenas' "testimony," purportedly acknowledging that he alone committed the crimes and explaining his motivation for creating the false web sites. This assertion misrepresents the record. Cardenas did not testify at trial. The references to his "testimony" are to the declaration Cardenas submitted to support defendant's posttrial motion for acquittal or new trial.

Defendant's remaining assertion is that the persons responding to the solicitations only wanted to engage in lawful consensual sex and, as a result, the evidence fails to support his convictions on the underlying substantive crime alleged in the conspiracy count and the crimes of stalking, false personation, and identity theft. We reject this argument as well.

Count 1 charged defendant and Cardenas with conspiracy to commit the crime of harassment by electronic communication. "A conviction of conspiracy requires proof that the defendant and another person had the specific intent to agree or conspire to commit an offense, as well as the specific intent to commit the elements of that offense, together with proof of the commission of an overt act 'by one or more of the parties to such agreement' in furtherance of the conspiracy." (*People v. Morante* (1999) 20 Cal.4th 403, 416.) As discussed above there was sufficient circumstantial evidence to support defendant and Cardenas agreed to create and post the false MySpace profile, web site advertisements, and e-mails. There was also evidence to support the three overt acts were alleged; defendant and Cardenas discussed placing the false ads and creating the fraudulent accounts for Melanie and Elsie Delanoy, the placement of the ads on web sites, and the use of Melanie Delanoy's and Elsie Delanoy's identities to make contact with the persons responding to the ads.

Penal Code section 653.2, subdivision (a) makes it a crime for one to "electronically distribute[], publish[], e-mail[], hyperlink[], or make[] available for downloading, personal identifying information, including, but not limited to, a digital image of another person, or an electronic message of a harassing nature about another person," "with [the] intent to place" that other "person in reasonable fear for his or her safety, or the safety of the other person's immediate family, . . . without consent of the other person, and for the purpose of imminently causing that other person unwanted physical contact, injury, or harassment, by a third party, . . . which would be likely to incite or produce that unlawful action." Here, defendant and Cardenas created a false MySpace profile for Melanie Delanoy and posted false web site advertisements that depicted Melanie and Elsie Delanoy as soliciting prostitution. Some of the advertisements named all four victims and provided their home and business addresses and telephone numbers. The victims testified as to how these advertisements caused

them fear. Melanie and Douglas Delanoy were sufficiently concerned for their safety that they moved to a new residence. We conclude this evidence sufficed to support defendant's conviction on count 1.

Count 2 charged defendant and Cardenas with the crime of stalking. Penal Code section 646.9, subdivision (a) makes it a crime for one to "willfully, maliciously, and repeatedly follow[] or willfully and maliciously harass[] another person and who makes a credible threat with the intent to place that person in reasonable fear for his or her safety, or the safety of his or her immediate family . . . ." Here there was sufficient evidence defendant and Cardenas willfully and maliciously harassed the Delanoys and Douglas' parents.

Defendant claims "the . . . messages received by the victims from the men solicited on the [I]nternet . . . reflects no threatening behavior, no threat to do personal harm or to force nonconsensual sex on the Delanoys." But the statute's "'credible threat' element" only "require[s] that the target of the threat . . . fear for the target's safety or that of his or her family," not "that the threat be 'against the life of, or [threaten] great bodily injury to the target." (*People v. Zavala* (2005) 130 Cal.App.4th 758, 767.) There was evidence defendant and Cardenas intended to encourage third parties to contact the victims for the purpose of engaging in sexual relations without the victims' consent. Even though they were never verbally or physically threatened by the persons responding to the advertisements, the publication of the victims' home and business addresses and telephone numbers created the possibility that they could have an unwanted encounter with persons viewing the advertisements. This potential sufficed to establish a credible threat. Thus, we conclude the evidence supports defendant's conviction on count 2.

Counts 3 through 6 charged defendant and Cardenas with false personation as to each of the victims. Penal Code section 529, subdivision (a)(3) makes it a crime for a "person [to] falsely personate[] another in either his or her private or official capacity,

and in that assumed character" do "any other act whereby, if done by the person falsely personated, he might, in any event, become liable to any suit or prosecution, or to pay any sum of money, or to incur any charge, forfeiture, or penalty . . . ." As noted, a police officer testified that the language used in the fraudulent MySpace profile and false advertisements suggested Melanie and Elsie Delanoy were offering to engage in prostitution. The mere fact none of the persons who responded to the ads expressly offered to pay for sexual services did not preclude the jury from finding the solicitees intended to do so. Thus, the evidence supports defendant's and Cardenas's convictions on these counts.

Finally, counts 7 through 10 charged defendant and Cardenas with identity theft. Penal Code section 530.5, subdivision (a) declares, "Every person who willfully obtains personal identifying information . . . of another person, and uses that information for any unlawful purpose, . . . without the consent of that person, is guilty of a public offense . . . ." "[T]o be guilty under section 530.5, subdivision (a), the defendant must (1) willfully obtain personal identifying information of another person, and (2) use the identifying information for an unlawful purpose without the person's consent." (*People v. Tillotson* (2007) 157 Cal.App.4th 517, 533.)

Defendant claims there "is no evidence in the record that [he] obtained . . . any personal identifying information, or that he used any personal identifying information for any unlawful purpose." He is wrong on both points. The police found a computer under his office desk that included information on the victims. Further, as discussed above, defendant could be held criminally liable for either conspiring with or aiding and abetting Cardenas in committing the crime.

"[T]he term 'unlawful'" has been defined "to include wrongful conduct which is not criminal," and thus "[u]nder this definition, unlawful conduct includes acts prohibited by the common law or nonpenal statutes, such as intentional civil torts." (*In re*

Rolando S. (2011) 197 Cal.App.4th 936, 946.) In *Rolando S.*, the court upheld a petition finding a minor violated Penal Code section 530.5, subdivision (a) when he accessed the victim's Facebook page and "wrote sexually explicit and vulgar comments on the victims' friends' walls, accessible by the victims' friends and acquaintances," thereby "clearly expos[ing] the victim to hatred, contempt, ridicule and obloquy . . . ." (*Id.* at p. 947.) The actions of defendant and Cardenas in creating a false MySpace profile and fraudulent web site advertisements suggesting the victims were soliciting prostitution constituted the tort of libel. (*Id.* at p. 946.) The evidence supports their convictions on these counts as well.

2. The Motions for Severance

Before trial, defendant filed a motion seeking to sever his trial from Cardenas' trial. The motion was supported by a declaration from Cardenas' attorney asserting as follows: (1) "Cardenas denies that he was in any conspiracy with [defendant]," but "[a]t a joint trial . . . would not testify, out of apprehension that . . . he might increase the chances that he would be convicted on . . . the conspiracy count"; and (2) "At a separate trial for [defendant] . . ., Cardenas would testify that he, . . . as a joke, with no intention to harm, made some postings" and "would enter a plea to avoid unnecessary costs of trial and to receive more lenient sentencing on a factual basis, which might include . . . an amended count of alleged annoying electronic communication . . . ." The trial court denied the motion.

During a pretrial hearing on Cardenas' statement to a police officer that he had recently purchased a new laptop, after the court ruled the statement was admissible, defendant renewed his motion for severance. The court again denied the motion.

Defendant now contends these rulings were erroneous. While acknowledging he and Cardenas were "both charged with identical crimes," defendant

asserts "much of the evidence would not have been cross-admissible at separate trials," the case "against Cardenas was strong," and "[t]he prosecution's theory" of defendant's culpability was "based solely on [his] relationship . . . as employer of Cardenas," plus the civil litigation between him and the Delanoys. He also claims that Cardenas would testify in his defense if the two were tried separately.

The trial court properly denied the severance motions. "When two or more defendants are jointly charged with any public offense . . . they must be tried jointly, unless the court order separate trials." (Pen. Code, § 1098.) The legislative preference for joint trials is to "'promote [economy and] efficiency' and '"serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts."'" (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 40.)

"But the court may, in its discretion, order separate trials 'in the face of an incriminating confession, prejudicial association with codefendants, likely confusion resulting from evidence on multiple counts, conflicting defenses, or the possibility that at a separate trial a codefendant would give exonerating testimony.'" (*People v. Avila* (2006) 38 Cal.4th 491, 574-575.) On appeal, the trial court's denial of a severance motion is reviewed "for abuse of discretion based on the facts as they appeared at the time the court ruled on the motion. [Citation.] If the court's joinder ruling was proper at the time it was made, a reviewing court may reverse a judgment only on a showing that joinder '"resulted in 'gross unfairness' amounting to a denial of due process."' [Citation.]" (*Id.* at p. 575.)

This case presents "a '"classic case"' for a joint trial" (*People v. Coffman and Marlow*, *supra*, 34 Cal.4th at p. 40), because defendant and Cardenas "were charged with having committed common crimes that involved the same individuals and the same series of events." (*People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1173.) The prosecution argued the two either conspired together to commit the charged crimes or

they aided and abetted each other in doing so. As a result, defendant's claim that much of the evidence would not have been cross-admissible in separate trials is incorrect. The only evidence that would have been excluded in a separate trial was Cardenas' statement that he had recently purchased a new laptop and the trial court instructed the jury to consider this statement only against Cardenas. "[T]he issue is not whether a theoretical separate trial of one defendant would have been different, but whether the joint trial that actually occurred was in some manner prejudicially unfair or unreliable." (*People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 381.) Since, "much evidence about which [defendant] complain[s] would have been relevant even at a separate trial," his "argument that some evidence admitted at a joint trial might not have been admitted at a separate trial misses the mark." (*Ibid*.)

We also disagree with defendant's claim that the case against Cardenas was strong while the evidence implicating him was weak. It was defendant who had the motive to create and post the fraudulent profile and advertisements. Evidence of numerous searches concerning the victims and fragments of the posted material was found on the computer located underneath defendant's office desk. Additionally, the evidence supported an inference that it was defendant, a resident of the gated community and the Delanoys' neighbor, who added Lambert's name to the guest list at the community gate and who later inquired whether anyone had sought entry to visit the Delanoys. Thus, the case against defendant was not based solely on his status as Cardenas' employer and his participation in the lawsuit against Melanie Delanoy.

Finally, we find the assertion that defendant could have called Cardenas as a witness in his defense in a separate trial unsupported by the record. The pretrial declaration submitted by Cardenas' attorney stated his client would be willing to testify for defendant only if he received a plea deal that eliminated the conspiracy charge and reduced the charge to attempted annoyance. Nothing in the record suggests the prosecution ever made or intended to make such an offer in this case.

Consequently, the trial court did not abuse its discretion in denying defendant's severance requests.

3. The Trial Court's Evidentiary Rulings

Defendant contends the trial court erred in both admitting Cardenas' statement about recently acquiring a new laptop and its exclusion of a defense witness called to impeach the credibility of Melanie Delanoy. "We review a trial court's rulings on the admission and exclusion of evidence under the abuse of discretion standard." (*People v. Thompson* (2010) 49 Cal.4th 79, 128.)

3.1 Cardenas' Statement

A forensic review of the laptop seized from Cardenas' residence reflected that its software was installed on December 2, 2009, less than two weeks after the police searched defendant's law office. Over objection, the prosecution was allowed to have a police officer testify Cardenas told him the laptop was new and replaced his older computer, but instructed the jury it could consider this evidence only against Cardenas.

The statement constituted a party admission (Evid. Code, § 1220). Generally, "The 'routine application of state evidentiary law does not implicate [a] defendant's constitutional rights.'" (*People v. Hovarter* (2008) 44 Cal.4th 983, 1010 [rule applied to party admission].)

Nonetheless, defendant attacks the trial court's decision to admit this testimony on two grounds. First, he argues the statement's admission violated *Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 1354, 158 L.Ed.2d 177]. Not so. *Crawford* held that under the Sixth Amendment's confrontation clause "Testimonial statements of witnesses absent from trial [are admissible] only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." (*Id*. at p. 59; *People v. Lopez* (2012) 55 Cal.4th 569, 576.)

Cardenas' comment was not testimonial. "[T]o be testimonial the statement must be made with some degree of formality or solemnity," and then "only if its primary purpose pertains in some fashion to a criminal prosecution." (*People v. Dungo* (2012) 55 Cal.4th 608, 619.) Cardenas mentioned recently acquiring the laptop in response to the police officer's offhand comment that the machine appeared to be new. Thus, the *Crawford* doctrine does not apply in this case.

Defendant's second claim is that the admission of the statement violated the *Aranda/Bruton* rule. (*People v. Aranda* (1965) 63 Cal.2d 518; *Bruton v. United States* (1968) 391 U.S. 123 [88 S.Ct. 1620, 20 L.Ed.2d 476].) This contention also lacks merit.

"The *Aranda/Bruton* rule addresses the situation in which 'an out-of-court confession of one defendant . . . incriminates not only that defendant but another defendant *jointly charged*.' [Citation.] 'The United States Supreme Court has held that, because jurors cannot be expected to ignore one defendant's confession that is "powerfully incriminating" as to a second defendant when determining the latter's guilt, admission of such a confession *at a joint trial* generally violates the confrontation rights of the nondeclarant.'" (*People v. Brown* (2003) 31 Cal.4th 518, 537.) Here, Cardenas' statement did not even mention defendant, much less "'powerfully incriminat[e]'" him. (*People v. Hajek and Vo, supra*, 58 Cal.4th at p. 1204.) The limiting instruction given by the trial court adequately protected defendant's confrontation right.

3.2 The Exclusion of Emily Young's Testimony

At trial, defendant sought to introduce the testimony of Emily Young to impeach Melanie Delanoy's credibility. (*People v. Wheeler* (1992) 4 Cal.4th 284, 295-296.)

According to the offer of proof, in 2007 Young worked for Village Way Management, a company that assisted the community's homeowner's association. In

June, Village Way Management obtained a cease and desist order barring the Delanoys from continuing with the home renovation until they obtained architectural approval of the project's plans. Thereafter, the Delanoys submitted plans for approval. Under the homeowners association's rules, once architectural plans have been submitted they will be automatically approved if no action is taken within 45 days. However, on July 5, Young sent the Delanoys a letter stating their plans had been approved. Young then forged the architect's initials on the plans. In a deposition during the civil action, Young admitted what she had done and explained, "'I felt pressure . . . [¶] . . . [¶] By Melanie saying it was approved, by all the other work I had in front of me. I was going to school at the time. Kind of a combination of everything.'"

The trial court excluded this evidence finding it to be likely irrelevant and citing Evidence Code section 352. We conclude the trial court properly exercised its discretion in doing so. (*People v. Sapp* (2003) 31 Cal.4th 240, 289-290.)

Young's proffered testimony was of questionable relevance, since she acknowledged that it was *her*, not Melanie Delanoy, who issued the approval letter and forged the architect's initials on the plans. Young did not claim Melanie asked her to commit these acts. While Young claimed she did so because of "pressure," Melanie's advocacy was only one of reasons mentioned. Even assuming Young's testimony has some tendency to impeach Melanie Delanoy, as the trial court noted its introduction would require the presentation of additional evidence explaining the background of the civil litigation. Consequently, Young's testimony presented a potential to consume a significant consumption of trial time and lead to the potential of confusing the issues. (Evid. Code, § 352; *People v. Daniels* (1991) 52 Cal.3d 815, 860-861.) The trial court properly exercised its discretion in barring the introduction of Young's testimony.

4. The Denial of Defendant's Motion for Acquittal or New Trial

Defendant filed a posttrial motion for acquittal or new trial on the grounds there was insufficient evidence to support his convictions and newly discovered evidence. The latter ground was supported by Cardenas' declaration, now stating he alone was responsible for the creation and posting of the MySpace profile and web site advertisements.

At a hearing on the motion, Cardenas also testified in support of the motion. On the stand, he admitted that in February 2010, after the police had seized the thumb drive from his home, he told defendant what he had done. Cardenas stated defendant "confronted me with the information" and asked "did you do this? . . . I just, like, admitted it and said, like, yeah, I'm sorry."

The trial court denied the motion. On the issue of whether Cardenas' willingness to admit sole responsibility for the criminal activity, the trial court held that it was not newly discovered and, even if it was, given Cardenas's criminal record and lack of credibility it would not have rendered a different verdict probable.

Defendant's insufficiency of the evidence ground has been previously discussed and no reason exists to reconsider it here. As for the newly discovered evidence claim, we conclude the trial court properly rejected it.

"A trial court may grant a new trial motion '[w]hen new evidence is discovered material to the defendant, and which he could not, with reasonable diligence, have discovered and produced at the trial.' [Citation.] In ruling on such a motion, the trial court considers several factors," including "'"'"the evidence, and not merely its materiality, be newly discovered'"'" and "'"'"the party could not with reasonable diligence have discovered and produced it at the trial.'"'" (*People v. Mehserle* (2012) 206 Cal.App.4th 1125, 1151.)

"""We review a trial court's ruling on a motion for a new trial under a deferential abuse-of-discretion standard." [Citations.] "'A trial court's ruling on a motion for new trial is so completely within that court's discretion that a reviewing court will not disturb the ruling absent a manifest and unmistakable abuse of that discretion.'""" (*People v. Lightsey* (2012) 54 Cal.4th 668, 729.)

Defendant's motion failed to satisfy the requirements for relief on the ground of newly discovered evidence. If we believe Cardenas' testimony at the hearing, defendant learned of his codefendant's criminal conduct in February 2010, well in advance of trial. And the trial court noted defendant "could have offered Cardenas' . . . admission at trial through his own testimony had he chosen to take the stand. He did not. He had exculpatory evidence available to him. He could have offered it, but he chose not to." The court recognized defendant "has no obligation to testify. He has an absolute constitutional right not to testify. And I appreciate the fact that this put[] him on the horns of a dilemma. Do I testify as I have a right to, and offer Cardenas' admissions as I have a right to? Or do I not offer them . . . . That was [defendant's] choice. [¶] The fact that a second avenue became available to [defendant] after trial . . . does not make the . . . admission[] newly discovered."

As noted, we conclude the evidence supports defendant's conviction. And his decision to not take the stand and testify about Cardenas' admission even though he was aware of it long before trial undermines defendant's newly discovered evidence claim. Thus, we conclude the trial court properly exercised its discretion in denying the new trial motion.

5. The Request for Judicial Notice

In an effort to resurrect the newly discovered evidence argument,

defendant asks us to take judicial notice of Los Angeles Superior Court records showing that in 2005, he represented Cardenas in a criminal prosecution. He claims this evidence "establishes that a long standing attorney-client relationship existed between [him] and . . . Cardenas," which "prohibited [his] . . . testifying as to . . . Cardenas' admission[]" unless Cardenas "waived his attorney-client privilege." We reject this belated contention.

The privilege only applies to a communication from one "who . . . consults a lawyer for the purpose of retaining the lawyer or securing legal service or advice from him in his professional capacity" (Evid. Code, § 951), which is "transmitted . . . *in the course of that relationship*" (Evid. Code, § 952, italics added); *Solon v. Lichtenstein* (1952) 39 Cal.2d 75, 80 ["A communication to be privileged must have been made to an attorney acting in his professional capacity toward his client"]).

Defendant's argument assumes he was still representing Cardenas in 2009 when the criminal activity underlying the current charges occurred. But he has not established a connection between his 2005 representation of Cardenas in a theft prosecution and the present case. Defendant argues there is no evidence their attorney-client relationship ever terminated. "[T]the burden of showing such relationship is on the party objecting to the evidence" (*Collette v. Sarrasin* (1920) 184 Cal. 283, 288), and the record fails to support such a finding. In fact, the evidence is that Cardenas worked as an employee in defendant's law practice in 2009.

People v. Hall (1942) 55 Cal.App.2d 343 involved an analogous situation. The defendant was charged with theft arising from his failure to remit funds collected for two judgments. The collection agreement with one judgment creditor identified a lawyer as the defendant's attorney. But the agreement with a second judgment creditor did not mention the lawyer. The Court of Appeal held the attorney could testify on matters pertaining to the latter agreement because it was an entirely different transaction to which the attorney-client relationship did not exist. (*Id.* at p. 356 ["No such arrangement was

made regarding the Bryon judgment, and hence the objection could not be good as to matters relating only to it"]; *People v. Gionis* (1995) 9 Cal.4th 1196, 1210 ["a communication is not privileged, even though it may involve a legal matter, if it has no relation to any professional relationship of the attorney with the client"].)

Since defendant has failed to establish the existence of a continuing attorney-client relationship with Cardenas, the documentation from the 2005 matter is not relevant. Thus, we deny the request for judicial notice.

DISPOSITION

Appellant's request for judicial notice is denied. The judgment is affirmed.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

IKOLA, J.

THOMPSON, J.